No. 89-1401

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In The

# Supreme Court of the United States

October Term, 1989

EXXON CORPORATION

*Petitioner,*

vs.

WYOMING STATE BOARD OF EQUALIZATION,

*Respondent.*

## BRIEF OF AMICI CURIAE STATES OF COLORADO AND NEW MEXICO IN SUPPORT OF EXXON CORPORATION'S PETITION FOR WRIT OF CERTIORARI TO THE WYOMING SUPREME COURT

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## QUESTIONS PRESENTED

1. Does Wyoming's use tax discriminate against interstate commerce by penalizing Exxon Corporation for hiring a Colorado company to accept delivery of, unload, inspect, sandblast, and epoxy-coat pipe which Exxon Corporation later installed in its Wyoming pipeline?

2. Should this Court settle the question, which it has reserved since 1937, whether a State must credit against its use tax a sales or use tax paid to another State?

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The States of Colorado and New Mexico, through their Attorneys General, and pursuant to United States Supreme Court Rules 37.2 and 37.5, respectfully submit their Brief as *amici curiae* in support of the Petition for Writ of Certiorari to the Wyoming Supreme Court filed by Exxon Corporation (Exxon).

## INTEREST OF AMICI CURIAE

Colorado is one base, among many, from which much commercial activity is directed into Wyoming. The

Wyoming use tax will directly affect the amount of commercial activity which takes place in Colorado. By failing to grant Exxon a credit for the Colorado use tax Exxon paid, the Wyoming use tax will discourage the owners and users of property from hiring Colorado-based companies to store, hold, or process the property before eventual use in Wyoming. Wyoming's failure to credit lawfully imposed Colorado use taxes against the Wyoming use tax grants Wyoming companies a direct commercial advantage over Colorado-based companies competing for commerce ultimately destined for Wyoming.

The Wyoming use tax grants Wyoming businesses a similar direct commercial advantage over companies located in New Mexico.

## SUMMARY OF THE ARGUMENT

The Wyoming Court decided a question of federal law in a way that conflicts with the decisions of this Court. This Court has consistently held that the Commerce Clause of the United States Constitution prevents a State from enacting tax laws which provide a direct commercial advantage to local businesses and which work to the detriment of interstate commerce. The Wyoming Supreme Court's opinion upholds a use tax scheme which provides a direct commercial advantage to Wyoming businesses and which penalizes people who do business with companies located in other States.

The Wyoming Court also decided an important question of federal law which has not been, but should be,

settled by this Court. This Court has not decided whether a State must credit a use tax paid to another State against its own use tax. Many States have enacted sales and use tax statutes. Sales and use taxes are significant parts of the revenue laws in these States. This Court should provide these States guidance on the relationship between these tax laws and the Commerce Clause.

## ARGUMENT

### I.

### THE WYOMING COURT HAS DECIDED A QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT.

The third prong of the four-part Commerce Clause test adopted by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 286-288 (1977) prohibits a State from imposing a tax which discriminates against interstate commerce. *D.H. Holmes Company, Ltd. v. McNamara*, 108 S.Ct. 1619, 1624 (1988); *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S.Ct. 2810, 2818 (1987).

> One of the fundamental principles of Commerce Clause jurisprudence is that no State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421 (1959).

*Maryland v. Louisiana*, 451 U.S. 725, at 754 (1981). *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329

(1977). A State may not impose a discriminatory tax designed to assure that non-residents direct their commerce to businesses located within the State. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 336 (1977). The Wyoming use tax provides a direct commercial advantage to Wyoming pipe processors and favors them over non-Wyoming companies like Energy Coating Company. The Wyoming use tax discriminates against Exxon's transactions with Colorado-based Energy Coating Company and assures that Exxon will direct these transactions to Wyoming businesses.

Exxon was required to pay an extra use tax of $395,346.86 for hiring a Colorado company to acce· delivery of, unload, inspect, sandblast, and coat the pipe. Exxon could have avoided this expense in one of three ways: (1) it could have had the pipe manufacturer coat the pipe before shipment from Japan, (2) it could have hired a firm located in a State or country which does not impose a use tax to perform these tasks, or (3) it could have hired a Wyoming firm to do the work. Each of these alternatives directs commerce away from Colorado solely because of the location of the Energy Coating Company plant. By making it more expensive for Exxon to do business with non-Wyoming companies, Wyoming is giving a direct commercial advantage to Wyoming businesses and is discriminating against interstate commerce.

> [E]quality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. [Footnote omitted.]

*Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64, at 70 (1963).

The Wyoming use tax discriminates against commerce with every State which imposes a use tax. The Colorado use tax is similar to use taxes imposed by many States and does not depend on the location of "first use". The Colorado tax unquestionably applied to Exxon's exercise in Colorado of its rights of ownership in the pipe. Colo. Rev. Stat. § 39-26-201(3) (1982). The Wyoming use tax will directly and adversely affect interstate commerce by making more expensive Exxon's dealings with businesses located in Colorado and in other States which impose a use tax. The Wyoming use tax conflicts with the fundamental purpose of the Commerce Clause, to assure the freedom to trade with businesses located in any State. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977).

Wyoming's imposition of its use tax only upon the "first use" of the property does not relieve the burden on interstate commerce. The Wyoming use tax applies to the exercise of any right of ownership in Wyoming. Wyo. Stat. § 39-6-502(a)(vii) (1977). Most State use taxes, like Colorado's use tax, are based on the in-State exercise of any right of ownership. Wyoming adds its tax to other State taxes based on the same transaction. By imposing its tax on this transaction without granting a credit for other State taxes based on the same transaction, Wyoming adds an additional burden to interstate transactions and places them at a disadvantage in relation to intrastate transactions.

This Court has often repeated that it will look not only to the face of a statute but also to its practical effect to determine whether it discriminates against interstate

commerce. *Goldberg v. Sweet*, 109 S.Ct. 582, 589 (1989); *American Trucking Associations, Inc. v. Scheiner*, 107 S.Ct. 2829, 2839 (1987); *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 616 (1981); *Bacchus Imports, Ltd. v. Diaz*, 468 U.S. 263, 270 (1984); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977); *Halliburton Oil Well Cementing Company v. Reily*, 373 U.S. 64, 69 (1963). In both *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984) and *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court struck down tax schemes which effectively discriminated against interstate commerce by granting credits to local businesses or transactions and denying the same credits to out-of-State businesses and transactions. The discriminatory effect of Wyoming's failure to credit the Colorado use tax against the Wyoming tax is plain: Exxon paid an extra use tax for its decision to hire a non-Wyoming company to take delivery of, unload, inspect, sandblast, and coat the pipe.

The dissenting Wyoming Supreme Court justice recognized the direct commercial advantage for Wyoming-based companies:

> Had the [Energy Coating Company] plant been located in Cheyenne, this pipe could only have been taxed once; but with location of first processing in Colorado, a dual tax on the same transaction is created.

(Petition for Writ of Certiorari to the Wyoming Supreme Court, Appendix A, p. A-13). The Wyoming tax administrators also recognized this direct commercial advantage. At the State Board of Equalization hearing, the tax administrators testified that they had met on several occasions with Exxon's representatives prior to the construction of

the pipeline. The administrators advised Exxon that "transactions should be structured to avoid multiple taxation where possible" (Petition for Writ of Certiorari to the Wyoming Supreme Court, Appendix A, p. A-25). The easiest way to "structure" the pipe-coating transaction so as to avoid multiple taxation, and perhaps the only practical way to do so, was to select a Wyoming-based company to do the work. This preference for local businesses, based solely on Wyoming's use tax, violates the free-trade principle of the Commerce Clause. *See Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 331 (1977).

The Wyoming use tax provides a direct commercial advantage to local businesses and discriminates against out-of-State businesses. The Wyoming use tax fails the third prong of the *Complete Auto Transit, Inc. v. Brady* test. The Wyoming Supreme Court decided this federal question in a way that conflicts with this Court's decisions. The Court should grant Exxon's Petition for Writ of Certiorari to the Wyoming Supreme Court.

## II.

## THE WYOMING COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Exxon correctly points out that this Court has reserved its opinion on the issue presented in this case:

> This Court has expressly reserved the question whether a State must credit a sales tax paid to another State against its own use tax.

*Williams v. Vermont*, 472 U.S. 14, at 21-22 (1985). *See Southern Pacific Company v. Gallagher*, 306 U.S. 167, 172 (1939);

*Henneford v. Silas Mason Company, Inc.*, 300 U.S. 577, 587 (1937). *See also* L. Tribe, *American Constitutional Law* 458 n.6 (2d Ed. 1988).

The Supreme Court has suggested that a use tax statute must provide a credit for a use tax paid to another State, but the Court has not settled the question. *See Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 107 S.Ct. 2810, 2819-20, (1987); *Henneford v. Silas Mason Company, Inc.*, 300 U.S. 577, 584 (1937).

The California Court of Appeals addressed this question in *Montgomery Ward & Company v. State Board of Equalization*, 272 Cal.App.2d 728, 78 Cal.Rptr. 373 (1969), *cert. denied*, 396 U.S. 1040 (1970). The California Court concluded that California's use tax discriminated against interstate commerce by its failure to provide a credit for sales taxes lawfully imposed in Nevada. Just as has occurred in Wyoming, the practical effect of the California tax was to favor local California stores, where California residents paid only California sales tax, over nearby Nevada stores, where California residents were required to pay both the Nevada sales tax and the California use tax.

The Wyoming Supreme Court cited Nowak & Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept*, 20 U.C. Davis L. Rev. 273 (1987) to support its conclusion that the Wyoming use tax does not discriminate against interstate commerce (Petition for Writ of Certiorari to the Wyoming Supreme Court, Appendix A, p. A-8). However, these authors fail to analyze, much less conceive of, the problem presented by this case. They fail to address

whether a use tax which does not grant credits for the use taxes paid to other States discourages the selection of an out-of-State firm to process property destined for in-State installation. Their conclusion is at odds with the conclusions of most States which impose sales and use taxes, with the Multi-State Tax Compact, and with most of the commentators. *Williams v. Vermont*, 472 U.S. 14, 22 (1985).

Wyoming, California, Colorado, and New Mexico each need direction from this Court on this important federal question which has been left unanswered for 53 years. This Court should grant Exxon's Petition for Writ of Certiorari to the Wyoming Supreme Court.

## CONCLUSION

By failing to credit the Colorado use tax against its own use tax, Wyoming will force enterprises like Exxon to contract with Wyoming-based companies in order to avoid paying multiple use taxes. The Wyoming use tax provides a direct commercial advantage to Wyoming businesses and discriminates against interstate commerce.

This Court has expressly reserved its opinion whether a State must credit against its use tax a use tax paid to another State. The Court should grant Exxon's Petition for Writ of Certiorari to the Wyoming Supreme Court and should settle this important federal question.

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